

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

LARRY THOMAS HOLLADAY,) 4:12CV3139
)
Petitioner,)
)
v.) **MEMORANDUM
AND ORDER**
DIANE SABATKA-RINE,)
)
Respondent.)

This matter is before the court on initial review of Petitioner Larry Thomas Holladay's ("Holladay" or "Petitioner") Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254. (Filing No. 1). The court will dismiss Holladay's Petition because it is a second or successive habeas corpus petition that has not been authorized by the Eighth Circuit Court of Appeals.

The statutory prohibition against successive petitions by state prisoners is codified in 28 U.S.C. § 2244(b), which provides in relevant part:

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

In *Magwood v. Patterson*, 130 S. Ct. 2788 (2010), the United States Supreme Court held that “the phrase ‘second or successive’ must be interpreted with respect to the judgment challenged.” *Id. at 2797*. In other words, the phrase “second or successive” applies to entire habeas petitions, and not to individual claims in those petitions. *Id. at 2798*.

This court’s records reflect that this is Holladay’s second petition for writ of habeas corpus in this court challenging the same judgment. He challenges the conviction for sexual assault, attempted sexual assault, and sexual assault on a child obtained in the Sheridan County District Court in 2005. (Filing No. [1](#) at CM/ECF p. 4.) Petitioner unsuccessfully challenged this same Sheridan County conviction in earlier federal habeas corpus litigation. See *Holladay v. Houston*, Case No. 8:10CV152 (D. Neb.) (dismissing petition with prejudice).

The pending Petition is a second or successive petition under the statute because it challenges the same Sheridan County conviction and sentence already challenged in this court. The record does not reflect that Petitioner has received permission from the Court of Appeals to again attack this conviction. If Petitioner wishes to continue to pursue this matter, he should file a motion with the Eighth Circuit Court of Appeals fully addressing the legal requirements for successive habeas petitions set forth in [28 U.S.C. § 2244\(b\)](#).

IT IS THEREFORE ORDERED that:

1. Holladay's Petition is dismissed without prejudice to reassertion of a subsequent petition upon authorization by the Eighth Circuit Court of Appeals.
2. A separate judgment will be entered in accordance with this Memorandum and Order.

DATED this 27th day of August, 2012.

BY THE COURT:

s/ Joseph F. Bataillon
United States District Judge

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